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November 9, 2016

Via ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
Washington, DC 20554

**Re: WC Docket No. 16-143, WC Docket No. 15-247, WC Docket No. 05-25,
RM-10593
Written Ex Parte Letter**

Dear Ms. Dortch:

On behalf of Lightower Fiber Networks I, LLC, Lightower Fiber Networks II, LLC, and Fiber Technologies Networks, L.L.C. (“Lightower”); Lumos Networks Corp. (“Lumos”) and Unite Private Networks (“UPN”) (collectively, the “Competitive Fiber Providers”), attached are Supplemental Declarations of (1) Eric Sandman, Chief Financial Officer of Lightower and (2) Jason Adkins, President of UPN. We submit these declarations to supplement prior submissions in this docket of each of the Competitive Fiber Providers, urging that the Commission not apply the proposed benchmark regulation to them and other similarly situated competitors.

Competitive Fiber Providers have shown in previous filings that applying such regulation, whether in the form of benchmarks or price caps, to competitors is not necessary to ensure that their prices are just and reasonable. The regulation would, in fact, be counterproductive, undermining the Commission’s primary goal of encouraging competition. The regulation would force competitors to *reduce* new network investment as

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the result of compliance cost, uncertainty, and increased cost of capital, thereby both reducing competitive alternatives and increasing the prices paid by customers for business data services (“BDS”).¹ For example, as stated in the Declaration of Timothy Biltz, CEO of Lumos, the uncertainty resulting from this proceeding has resulted in Lumos **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED] **[END HIGHLY CONFIDENTIAL]**.

In recent filings since the release of a Fact Sheet describing Chairman Wheeler’s proposed order³, some parties have urged the Commission to apply price regulation to packet-based

¹ Comments of Lightower Fiber Networks I, LLC, Lightower Fiber Networks II, LLC and Fiber Technologies Networks, LLC (filed June 28, 2016) (“Lightower Comments”); Joint Reply Comments of Lightower Fiber Networks I, LLC, Lightower Fiber Networks II, LLC and Fiber Technologies Networks, LLC (filed Aug 9, 2016); Lightower Fiber Networks I, LLC, Lightower Fiber Networks II, LLC, and Fiber Technologies Networks, LLC Notice of Ex Parte (filed Aug. 3, 2016); Lumos Networks Corp. Notice of Ex Parte (filed Aug. 29, 2016); Lightower Fiber Networks I, LLC, Lumos Networks Corp. and Unite Private Networks, LLC Notice of Ex Parte Communication (filed Sept. 15, 2016); Lightower Fiber Networks I, LLC and Lumos Networks Corp. Notice of Ex Parte Communication (filed Sept. 23, 2016); Lumos Networks Corp. Notice of Ex Parte Communication (filed Sept. 26, 2016); Lightower Fiber Networks I, LLC, Lumos Networks Corp. and Unite Private Networks, LLC Written Ex Parte Letter and Supporting Declarations of Eric Sandman (“Sandman Decl.”), Timothy Biltz and Jason Adkins (“Adkins Decl.”) (filed Oct. 5, 2016; Errata filed Oct. 11, 2016) (“*Competitive Fiber Providers Oct. 5 Ex Parte*”); Lightower Fiber Networks I, LLC, Lumos Networks Corp. and Unite Private Networks, LLC Notice of Ex Parte Communication (filed Oct. 17, 2016).

² Declaration of Timothy Biltz, ¶ 15 (filed Oct. 5, 2016) (“Biltz Decl.”). A filing by the Schools, Health & Libraries Broadband Coalition (“SHLB”) asked the Commission to “lower prices for Ethernet, as well as TDM in order to ensure that small and rural anchor institutions can receive lower rates for their broadband services.” Ex Parte Notice from John Windhausen, Jr., SHLB Coalition to Marlene Dortch, Secretary, FCC, at 1 (filed Nov. 3, 2016). In fact, Competitive Fiber Providers are already bringing lower rates for broadband services to many schools, libraries and healthcare institutions. Regulation of competitive providers would reduce, rather than increase the benefits received by schools, libraries and health institutions.

³ Chairman Wheeler’s Proposal to Promote, Fairness, Competition and Investment in the Business Data Services Market, (rel. Oct. 7, 2016) (“Fact Sheet”).

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BDS of 50 Mbps or less.⁴ Those advocating such regulation have not been precise in identifying the types of providers of packet-based BDS to which such regulation would apply. This product market is important to Competitive Fiber Providers.⁵ Competitive Fiber Providers are concerned that despite the Commission's long history of regulating prices of only those providers with market power,⁶ such proposed regulation might not be limited to such providers. They urge the Commission not to apply any price regulation — whether in the form of benchmarks or price caps — to providers that lack market power.

I. The Commission Should Not Regulate Prices of Providers Such as CFPs That Lack Market Power.

Level 3, one of the parties advocating price regulation of packet-based BDS of 50 Mbps or less, recently urged the Commission in two filings to “apply price cap regulation to Ethernet business data services of 50 Mbps capacity and below,”⁷ and to “bring low-bandwidth Ethernet services within the price cap regime. . . .”⁸ In neither filing did Level 3 make explicit that it was proposing regulation of the rates of only those carriers with

⁴ Letter from Rebecca Murphy Thompson, Competitive Carriers Association (“CCA”), at 2-3 (filed Oct. 24, 2016) (“*CCA Oct. 24 Ex Parte*”); Ex Parte Notice from Thomas Jones, Counsel for Level 3 Communications, at p. 4 (filed Oct. 20, 2016) (“*Level 3 Oct. 20 Ex Parte*”); Ex Parte Notice from Thomas Jones, Counsel for Level 3 Communications, at 1 (filed Oct. 18, 2016) (“*Level 3 Oct. 18 Ex Parte*”); Letter from Emily J. H. Daniels, Counsel to Sprint Corporation, attaching Letter from Charles W. McKee, Sprint Corporation at 3, n. 7 (filed Oct. 17, 2016) (“*Sprint Oct. 17 Ex Parte*”).

⁵ The percentage of lit packet-based circuits that Lighttower provides that is 50 Mbps or less is [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] Supplemental Declaration of Eric Sandman, ¶ 2. For Lumos, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] circuits out of a universe of [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] circuits are 50 Mbps or less (i.e. approximately [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]). [END HIGHLY CONFIDENTIAL] See Letter from Eric Branfman, Counsel for Lumos Networks Corp. to Marlene Dortch, Secretary, FCC, Attachment at 5 (filed Sept. 26, 2016).

⁶ *Competitive Fiber Providers Oct. 5 Ex Parte*, at 3-4.

⁷ *Level 3 Oct. 18 Ex Parte*, at 1.

⁸ *Level 3 Oct. 20 Ex Parte*, at 4.

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market power.⁹ Previously, Level 3 had explained that its proposal under a competitive market test would only regulate the prices of the “leading competitor” in a non-competitive market, the “carrier most likely to be able to exercise market power” in that market.¹⁰ Competitive Fiber Providers believe that the Commission should interpret Level 3’s request for regulation of packet-based BDS of 50 Mbps or below to apply only to those BDS providers with market power — currently the ILECs.

Sprint, another advocate of ex ante regulation of Ethernet at 50 Mbps and below, appears to agree that such regulation should be limited to the ILECs. In a November 3, 2016 ex parte, Sprint argued that regulation of Ethernet at 50 Mbps and below should be subject to price caps and that the Commission should permit ILECs the opportunity to demonstrate that competition is adequate in the individual locations where competition might be present, and excuse them from price caps in these locations, through waiver requests.¹¹ It seems clear that Sprint did not intend for price caps to apply to competitive fiber providers, since it proposed that only ILECs be permitted to be excused from price caps.

In a recent *ex parte*, AT&T argues that while the provision of Ethernet should not be subject to ex ante regulation, the Commission should subject ILECs to the same regulatory scrutiny as non-ILECs. AT&T argues that “there is no basis for . . . different treatment” because “all Ethernet providers are ‘new entrants’ and have deployed these services on an equal marketplace footing.”¹² This assertion is false. First, AT&T and other ILECs, unlike competitors, possess inherent advantages when entering the Ethernet market by virtue of their dominant market share in TDM BDS.¹³

⁹ Similarly, CCA’s ex parte expressed “disappointment” that the Chairman’s Fact Sheet did not reflect regulation of Ethernet pricing and proposed that the Commission adopt a presumption that the Ethernet market, at 50 Mbps and below, is not competitive. *CCA Oct. 24 Ex Parte* at 2-3. CCA did not, however, explain or identify which types of entities providing Ethernet BDS that it proposed the Commission regulate.

¹⁰ E.g., Ex Parte Notice from Thomas Jones, Counsel for Level 3 Communications to Marlene Dortch, Secretary, FCC, at 10-12 (filed Sept. 9, 2016).

¹¹ Ex Parte Notice from Christopher Wright, Counsel for Sprint Corporation to Marlene Dortch, Secretary, FCC, at 1 (filed Nov. 3, 2016).

¹² Letter from James P. Young, Counsel for AT&T to Marlene Dortch, Secretary, FCC, at 21-22 (filed Oct. 25, 2016) (“*AT&T Oct. 25 Ex Parte*”).

¹³ *See In the Matter of Business Data Services in an Internet Protocol Environment, Investigation of Certain Business Data Services in Tariff Pricing Plans*,

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Second, AT&T and other ILECs use lock-up contracts to force these customers seeking to switch from ILEC-provided TDM BDS to Ethernet BDS to purchase Ethernet BDS from the ILEC or pay huge penalties.¹⁴ Third, AT&T and other ILECs possess ubiquitous fiber networks, which even where used initially for TDM, can easily be repurposed with additional networking equipment to provision Ethernet. Furthermore, when it is necessary to deploy additional fiber to provide Ethernet, the ILECs have economies of scale that competitors lack, enabling them to spread the cost of deployment over far more customers than any competitor has. Competitive fiber providers not only lack an existing ubiquitous network but they must first obtain access to right-of-way that the ILECs have occupied for decades, if not longer, and typically at minimal cost. Nor do ILECs generally incur franchise and building access costs that are incurred by competitors.¹⁵ Thus, AT&T and competitors do *not* deploy Ethernet BDS on an “equal marketplace footing.”

AT&T also argues that on a national basis Level 3 and Charter are the second and third largest providers of Ethernet BDS.¹⁶ In relying on national data, AT&T obscures the significance of relevant geographic market and market share. Whether the relevant geographic market is a census block, a census tract, an MSA, or something in between, the ILEC’s market share is typically far higher than either Level 3 or Charter’s. Level 3 and Charter may boost their share of a national market that is not of competitive significance

Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd. 4723, 4819, ¶ 217 (showing ILECs and their affiliates to have 82% market share of BDS).

¹⁴ See Ex Parte Letter from Paul Margie, Counsel to Sprint Corporation to Marlene Dortch, Secretary, FCC, at 7 (filed Sept. 23, 2015) stating that (by waiving shortfall and early termination fees in contracts for TDM BDS only if the customer buys Ethernet from the ILEC, ILECs are able “to exploit their historical dominance of DSN services to capture the rising demand for Ethernet services” and “ensure[] that [they] capture[] demand for upgraded technologies”); See also Ex Parte Letter from Keith Krom, AT&T to Marlene Dortch, Secretary, FCC, at 1, 5 (filed Oct. 13, 2015) stating that (AT&T “waives ETFs as a matter of course for customers who migrate DSN circuits to AT&T Switched Ethernet Service.”).

¹⁵ Lighttower Comments at 14.

¹⁶ *AT&T Oct. 25 Ex Parte* at 22.

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by competing in the territories of all major ILECs, but that is of relatively little consequence when measuring their power to control price in any particular local market. Moreover, the data on which AT&T bases its statement about size of sales does not distinguish between Type I and Type II BDS circuits. When Level 3 or another competitive provider is utilizing a circuit that it leases from AT&T to serve a customer, the competitive pressure that Level 3 or other competitive provider can place on AT&T is nullified by the fact that AT&T controls the price at which Level 3 or other competitive provider buys the underlying service from AT&T.

II. There is no evidence in the record that CFPs are charging unjust or unreasonable rates

In its October 17, 2016 ex parte, Sprint argues that it must pay ILECs rates that exceed a competitive rate for Ethernet BDS. Sprint goes beyond that assertion, however, arguing in addition that “it is far from clear that the rates from [Sprint’s] preferred competitive providers are those that would prevail in an effectively competitive market place” and [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] Thus, it appears that Sprint may be suggesting that competitive providers’ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] should be regulated.¹⁸ As we show below, Sprint’s methodology does not support such a conclusion.

In an ex parte filed in May, Sprint submitted a calculation of the rates it believes would prevail in an effectively competitive marketplace, as generated by Sprint’s model.¹⁹ For several reasons, however, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] could not show that competitive providers are charging unjust and unreasonable rates, earning more than a reasonable profit, or even earning any profit at all.

First, Sprint’s model focuses on the costs of an “incumbent carrier” with “an existing network” in “building, connecting and repairing, and maintaining a fiber lateral to a

¹⁷ *Sprint Oct. 17 Ex Parte* at 3, n. 7.

¹⁸ *Id.*

¹⁹ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]

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particular Sprint location.”²⁰ Whatever the merits of such a model in measuring ILEC costs, such a calculation, by omitting the cost of a backbone network, fails to model the business decisions that Competitive Fiber Providers make in deciding whether to serve a particular area. For example, Mr. Biltz, CEO of Lumos, submitted a declaration describing Lumos’s decision to expand from its then-existing service territory in western Virginia by undertaking “an 822-mile network expansion into the ‘Tidewater’ area of Virginia, encompassing the metro areas of Norfolk, Hampton, Chesapeake, Suffolk, Newport News and Virginia Beach.”²¹ For such an expansion to be economically feasible, Lumos will have to recover not only its cost of building, operating, and maintaining laterals, but also the backbone network that is indispensable to any Lumos offer of service in the Tidewater area. Sprint’s cost model thus ignores the largest costs any provider incurs, and any comparison between competitive provider rates and the costs generated by Sprint’s model cannot be relied upon in assessing whether competitive provider rates are “those that would prevail in an effectively competitive market place.”²²

Second, Sprint’s model uses an after-tax overall return on investment of [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL].²³ While the Connect America Fund model used an overall cost of capital of 8.5%, the Commission limited that cost of capital to price-cap carriers and recognized that where carriers have higher systematic risk, a higher cost of capital would be appropriate.²⁴ Given their much smaller size and limited operating history, and lack of comparable access to capital markets, CFPs are far riskier investments than price cap carriers and thus investors require a higher rate of return. As shown by the Supplemental Declaration of Jason Adkins and of Eric Sandman, using an [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] cost of capital significantly understates the overall return on investment required by competitive providers and therefore understates competitive providers’ overall costs.

²⁰ *Id.* at 1.

²¹ Biltz Decl. ¶ 6.

²² *Sprint Oct 17 Ex Parte* at n. 7.

²³ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]

²⁴ *Connect America Fund, High-Cost Universal Support*, Report and Order, 29 FCC Rcd. 3964, 4011-12, ¶¶ 107-08 (Wireline Comp. Bur. 2014).

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Third, CFPs incur costs of franchise fees and building access fees that are generally not charged to the ILEC²⁵ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL].²⁶ These fees must also be considered in assessing whether a CFP is charging an unjust or unreasonable price for Ethernet.

Sprint and other large carriers have far more bargaining power than CFP's in negotiating price and terms of service, and are often able to obtain rates that do not even cover the CFP's cost of capital. Regulating rates of CFP's would almost certainly result in a *higher* cost of BDS for Sprint and other wireless carriers as it would reduce the ability of CFP's to raise capital to provide BDS in competition with the ILEC.

III. Second FNPRM

The Fact Sheet summarizing Chairman Wheeler's proposal, released October 7, 2016, describes a second FNPRM, to be issued in conjunction with the proposed order. The Fact Sheet suggests that the Commission will seek comment on how "to deal with any concerns that may emerge with respect to pricing for packet-based BDS."²⁷ As stated above, Competitive Fiber Providers believe that there should be no concerns at this time with respect to pricing of packet-based BDS they provide.

Competitive Fiber Providers are, however, concerned that the Second FNPRM might contain tentative conclusions that could have the unintended consequence of creating unnecessary concern in the investment community that funds competitive fiber networks. This community is quite sensitive to any suggestion that competitors' prices may come under FCC regulation - even benchmarks. For example, Lumos has received numerous calls from shareowners and potential shareowners asking about the potential impact of this proceeding on Lumos.²⁸ Competitive Fiber Providers have all had similar inquiries from the investment community. Competitive Fiber Providers thus urge the Commission to avoid adopting tentative conclusions in the Second FNPRM that could be interpreted to

²⁵ Biltz Decl., ¶ 19; Sandman Decl., ¶ 16; Adkins Decl., ¶ 12.

²⁶ See generally [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]

²⁷ Fact Sheet, at 3.

²⁸ Biltz Decl., ¶ 14.

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suggest that the prices of CFPs' packet-based BDS will be subject to price regulation, whether by price caps, benchmarks or otherwise, to avoid constraining the availability of investment capital that is indispensable to continued construction of more competitive fiber networks.

IV. Conclusion

For the reasons stated above and in Competitive Fiber Providers' prior submissions, Competitive Fiber Providers request that if the Commission elects to regulate prices of some carriers for packet-switched BDS, it not regulate prices of CFPs for packet-switched BDS.

Please contact the undersigned with any questions regarding this filing.

Respectfully submitted,

/s/ Eric J. Branfman

Eric J. Branfman
Joshua M. Bobeck

Counsel for Lightower Fiber Networks I, LLC et al., Lumos Networks Corp. and Unite Private Networks

Attachment

cc: (via email): Public Version

Commissioner Michael O'Rielly
Ambassador Philip Verveer
Amy Bender
Travis Litman
Nicholas Degani
Claude Aiken
Matthew DelNero
Paul De Sa
William Dever
Deena Shetler
Eric Ralph
Pamela Arluk

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Irina Asoskov
Joseph Price
William Layton
William Kehoe
David Zesiger
Justin Faulb
Christine Sanquist
Richard Benson

cc: (via Hand Delivery)

Christopher Koves

Supplemental Declaration of Eric Sandman

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Business Data Services in an Internet)	
Protocol Environment)	WC Docket No. 16-143
)	
Investigation of Certain Price Cap Local)	
Exchange Carrier Business Data Services)	
Tariff Pricing Plans)	WC Docket No. 15-247
)	
Special Access for Price Cap Local)	WC Docket No. 05-25
Exchange Carriers)	
)	
AT&T Corporation Petition for Rulemaking)	RM-10593
To Reform Regulation of Incumbent Local)	
Exchange Carrier Rates for Interstate Special)	
Access Services)	

**REDACTED SUPPLEMENTAL DECLARATION OF ERIC SANDMAN
OF LIGHTOWER FIBER NETWORKS I, LLC, LIGHTOWER FIBER NETWORKS II,
LLC, AND FIBER TECHNOLOGIES NETWORKS, LLC**

1. My name is Eric Sandman. I am Chief Financial Officer at Lightower Fiber Networks I, LLC and its affiliates ("Lightower"). I previously submitted a declaration in these dockets. This declaration supplements the previous one.

2. As Chief Financial Officer, I am familiar with Lightower's cost of capital. **[BEGIN**

HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] **[END**

HIGHLY CONFIDENTIAL]

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3. I am also familiar with the mix of lit packet-based circuits that Lighttower sells.

[BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] **[END HIGHLY CONFIDENTIAL]**

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my information and belief.


Eric Sandman

Dated: November 7, 2016

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Supplemental Declaration of Jason Adkins


Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
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Business Data Services in an Internet)	
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)	
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Exchange Carriers)	
)	
AT&T Corporation Petition for Rulemaking)	RM-10593
To Reform Regulation of Incumbent Local)	
Exchange Carrier Rates for Interstate Special)	
Access Services)	

SUPPLEMENTAL DECLARATION OF JASON ADKINS ON BEHALF OF
UNITE PRIVATE NETWORKS

1. My name is Jason Adkins, and I am President of Unite Private Networks("UPN"). I previously submitted a declaration in these dockets. This declaration supplements the previous one.
2. As President, I am familiar with UPN's cost of capital. UPN's cost of capital is significantly higher than the 8.5% used by the FCC in the Connect American Fund proceeding for price cap LECs.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my information and belief.



Jason Adkins

Dated: November 4, 2016